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TAGS: UNSC PREL UNMIK KO
SUBJECT: WGIT -- GUIDANCE FOR JUNE 18 MEETING

¶1. The Department requests that USUN draw on the following guidance for its participation in the June 18 meeting of the Working Group on International Tribunals.

ICTY/ICTR

¶2. USUN should bear in mind the following redlines regarding our ICTY/ICTR policy as discussions proceed:

-- No impunity for fugitives; Karadzic, Mladic, and Kabuga must face international justice;

-- Any resolution on residual mechanisms or follow-on actions should not list which fugitives should be tried where or who should be tried internationally versus nationally. We believe these are more appropriately judicial decisions. However, the resolution could set parameters for this judicial decision, such as through an amendment of Rule 11bis;

-- The residual mechanism(s) should be funded through assessed, not voluntary, contributions;

-- States should have a continued obligation to cooperate with the residual mechanism(s).

¶3. USUN should make the following points during the discussion of the Belgian's proposed elements for a draft resolution on an ICTY/ICTR residual mechanism:

-- We thank the Belgian delegation for their efforts. This draft represents a step forward, allowing for more detailed exchanges and discussion.

-- Discussions on the draft should focus on the fundamental goal of eliminating impunity for war crimes.

-- Now that discussions are becoming more detailed, it is important to have a clearer picture of estimated costs. The working group should ask for specific figures and cost breakdowns from the tribunals to inform further discussions.

-- We also believe there are a number of threshold issues the working group needs to consider, since they will determine the shape and direction of the draft. These include the following:

-- Should the draft resolution downsize the existing institutions by amending their authorities and scope, or should it establish a new mechanism(s) (which would

seem to imply closure or cessation of the existing institutions)? The working group should evaluate the operational and legal implications of each of these approaches, and the degree to which any resulting problems could be addressed or ameliorated by the language of the resolution. For example, what would be the effect of each of these approaches on the agreements that States have entered into with the tribunals?

-- Over time, the quantity and pace of work of the residual mechanism(s) should drop, and their work will likely need to be reduced in both scope and authority. We welcome thoughts on how best to build in flexibility and benchmarks into the process and draft in order to facilitate this process.

-- Another initial matter to consider is whether the ICTY and ICTR residual entities need to be the same, with parallel authorities and mandates. We believe it may make sense to tailor the scope and authorities of the mandates for the residual mechanism to the specific needs of each institution. For example, given the two tribunals, different histories and experiences with Rule 11bis transfers, there could be differences in whether each institution is authorized to continue to monitor cases transferred to national jurisdictions under Rule 11bis.

-- In addition, we have the following general comments on the draft resolution. Our comments are based on our long-standing position that any residual mechanism(s) should be streamlined, small, and efficient. As a result, we believe that certain potential functions listed in the draft are overly extensive, unnecessary, or could be appropriately addressed by other means. Some examples:

-- Monitoring of cases, including the authority to send mechanism staff to national courtrooms for first hand monitoring, referred to national jurisdictions under Rule 11bis by the ICTY. Such hands-on monitoring would appear unnecessary in the ICTY context where this task could be ably fulfilled by other organizations such as the OSCE.

-- Recovery of legal aid payments made to indictees who are determined retrospectively not to be indigent, or only partly indigent (seen as not worth the associated costs), however, in the event of a post-completion trial, the residual mechanism should have the authority to determine indigence of the defendant in question for the duration of that trial and appeal.

-- Active prevention of double jeopardy by the residual mechanism(s); however, there could be some component of the UNSC resolution that demands that States adhere to the principle of no double jeopardy.

-- Power to order restitution of property and proceeds of criminal conduct.

-- Public information and capacity building in the national jurisdictions of the States within the jurisdiction of the Tribunals, however, in the event of a post-completion trial, the residual mechanism should have the capacity to conduct limited public information work with regards to that trial only. Further, public information work that is necessarily part of maintaining the tribunals, archives, such as the maintenance of a website, etc., is similarly excepted. Also, the UNSC resolution should encourage States and non-State actors to continue capacity building post-completion on a voluntary basis.

ICTR: Kenya and the Democratic Republic of Congo (Kinshasa)

¶4. Given pending bilateral discussions, USUN should not endorse or foreclose future Security Council action against Kenya or the the DRC. The Department requests that USUN assess the preferences of other Council Members and report

any options discussed.

¶5. USUN should draw on the following points in discussing Kenya and the DRC:

-- We continue to call on all states, including Kenya and the DRC, to fulfill their legal obligations to cooperate fully with the ICTR.

-- We are raising this issue with our Kenyan counterparts in Nairobi and Kenyan Prime Minister Odinga.

-- We are also raising the issue in Kinshasa. We are encouraged by signs that the GDRC intends to meet with the Tribunal's prosecutor to discuss steps toward apprehending ICTR fugitives suspected of being in the DRC.
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